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No. 03-1342

Supreme Court, U.S.
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In The Supreme Court of the United States

DAIMLERCHRYSLER CORPORATION,

Petitioner,

v.

SHERYL YSBRAND AND MARY COONEY, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Oklahoma

AMICUS CURIAE BRIEF OF THE OKLAHOMA STATE CHAMBER OF COMMERCE AND INDUSTRY, INC. IN SUPPORT OF DAIMLERCHRYSLER CORPORATION'S PETITION FOR A WRIT OF CERTIORARI

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AMICUS CURIAE BRIEF OF THE OKLAHOMA STATE CHAMBER OF COMMERCE AND INDUSTRY, INC. IN SUPPORT OF PETITIONER DAIMLERCHRYSLER CORPORATION'S PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OKLAHOMA

This *amicus curiae* brief is submitted on behalf of The Oklahoma State Chamber of Commerce and Industry, Inc. ("The Oklahoma Chamber").[1] Petitioner DaimlerChrysler Corporation ("DCC") has consented to the filing of this brief, and a letter from DCC's counsel reflecting this consent has been filed with the Clerk of the Court. Respondents, Sheryl Ysbrand and Mary Cooney, Individually and on Behalf of All Others Similarly Situated, have also consented to the filing of this brief, and a letter from Respondents' counsel reflecting this consent has also been filed with the Clerk of the Court. This brief is therefore being filed pursuant to Supreme Court Rule 37.2(a).

I. INTEREST OF *AMICUS CURIAE*

The Oklahoma Chamber, which also serves as the State Manufacturers' Association for all Oklahoma businesses, is a not-for-profit association organized under 26 U.S.C. § 501(c)(6). The 78-year-old organization was the nation's first accredited state chamber. Its membership includes more than 2,000 individual business locations in 25 states.

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[1] This brief was authored in whole by outside counsel for *amicus curiae*, the Oklahoma Chamber. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

The Oklahoma Chamber has a strong interest in the development of rational standards of liability that enhance, and do not harm, the economy. The Oklahoma Chamber often advocates positions on questions of significant importance to Oklahoma's business community. *See* The State Chamber, *Champion Program: Initiative Two* (2004), *available at* http://www.okstatechamber.com/file_upload/InitativeTwo.pdf (last visited April 7, 2004). The fact that its members have been named as defendants in class action lawsuits gives The Oklahoma Chamber a unique interest in further educating this Court about the issues presented in DCC's Petition for a Writ of Certiorari.

II. SUMMARY OF ARGUMENT

In its decision in *Ysbrand v. Daimlerchrysler Corp.*, 2003 OK 17, 81 P.2d 618 (the "Oklahoma *Ysbrand* opinion"), the Supreme Court of Oklahoma found that the law of the principal place of business of the manufacturer applies to *all* proposed class members' claims for breach of warranty under the Uniform Commercial Code, regardless of the residency of the claimants or where the sales took place. The court therefore found that there were issues of law common to the proposed class. Based in part upon that finding, the court affirmed certification of a class of plaintiffs domiciled or residing in any of the fifty states of the United States of America or in the District of Columbia who could assert the "no injury" breach of warranty claims asserted by the named plaintiffs.

Many jurisdictions do not permit a manufacturer to be held liable for claims of breach of warranty where there is no injury. For an Oklahoma court to hold a manufacturer liable to a nationwide class of plaintiffs – most of whom

are not residents of the State of Oklahoma and did not purchase the subject products in the State of Oklahoma – for conduct that would not be actionable if the manufacturer were sued in individual actions in other jurisdictions, is a violation of Due Process. The Oklahoma *Ysbrand* decision, if allowed to stand, will thus have the effect of diluting Due Process protections affecting manufacturing businesses that may be subject to the jurisdiction of Oklahoma courts. That decision decides this important federal question in a way that is contrary to relevant decisions of this Court, another state court of last resort and several United States Courts of Appeals.

The Oklahoma *Ysbrand* decision, if left undisturbed, will likely make Oklahoma an extraordinarily attractive forum for filing class action lawsuits for breach of warranty. On the other hand, it will likely make Oklahoma an unattractive location for manufacturers to conduct business. This court-sanctioned dilution of Due Process protections undoubtedly will affect the decisions of manufacturing businesses relating to actions that could give Oklahoma courts jurisdiction over those businesses, such as whether to locate and/or to remain in Oklahoma and whether to sell products to companies and persons in Oklahoma or conduct any other business activities in Oklahoma. The Oklahoma Chamber requests that this Court consider the points raised in this *amicus curiae* brief and grant DCC's Petition for a Writ of Certiorari.

III. ARGUMENT

PROPOSITION ONE: THE OKLAHOMA *YSBRAND* DECISION DILUTES A MANUFACTURER'S DUE PROCESS PROTECTIONS.

The Due Process Clause of the United States Constitution provides, in part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1. DCC Appendix D. As noted by this Court in *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559, 572, n. 17 (1996), "State power may be exercised as much by a jury's application of a state rule of law in a civil suit as by a statute."

In the Oklahoma *Ysbrand* decision, the Supreme Court of Oklahoma found that the law of the principal place of business of the manufacturer applies to claims for breach of warranty under the Uniform Commercial Code by "[a]ll entities and adult persons domiciled or residing in any of the fifty states of the United States of America or in the District of Columbia," who purchased the described "minivan" and are not otherwise excluded from the class. DCC Appendix A at 3a-4a. The decision to apply the law of the principal place of business of the manufacturer to the claims of all proposed class members, even if that law would not be applied if separate lawsuits were filed by individual plaintiffs, allows the exercise of State power in a way that dilutes the protections afforded by Due Process.

In *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985), this Court was asked to determine whether the application of Kansas law to the claims of all proposed class members would violate constitutional protections, including Due Process. This Court stated, "We must *first* determine whether Kansas law conflicts in any material

way with any other law which could apply." *Id.* at 816 (emphasis added). This Court noted that the laws of Texas and Oklahoma, which the petitioner argued should be applied to many of the claims, conflicted with Kansas law. Application of Texas law "would vastly reduce petitioner's liability" *Id.* at 817. Further, according to petitioner, applying Kansas law to all claims could create liability that would not exist under Oklahoma law. *Id.* This Court then stated:

> Kansas must have a "significant contact or significant aggregation of contacts" to the claims asserted by each member of the plaintiff class, contacts "creating state interests," in order to ensure that the choice of Kansas law is not arbitrary or unfair. *Allstate [Ins. Co. v. Hague],* 449 U.S. [302] at 312-313 [1981]. Given Kansas' lack of "interest" in claims unrelated to that State, *and the substantive conflict with jurisdictions such as Texas,* we conclude that application of Kansas law to every claim in this case is sufficiently arbitrary and unfair as to exceed constitutional limits.

472 U.S. at 821-22 (emphasis added).

Here, the claims of the members of the proposed class are for breach of warranty due to allegedly defective air bags in certain minivans. Those excluded from the class include "those who have suffered personal injury from air bag deployment." DCC Appendix A at 3a-4a. Respondents allege that the airbags in their vehicles are potentially dangerous, but they deny having been injured by the airbags. DCC Appendix C at 50a-52a, 54a-57a, 59a. Respondents do not allege that the airbags in their vehicles have malfunctioned, but contend that they "have been harmed economically as they have not received the vehicles

they contracted for and instead have been misled into purchasing vehicles with a diminished value." *Id.* at 59a. Respondents seek "economic damages compensating them for the cost to repair their vehicles [and] diminution in value of their vehicles. . . ." *Id.* at 50a.

Many, if not most, jurisdictions that have considered the viability of such "no injury" economic-loss-only warranty claims have refused to recognize them, holding that purchasers of an allegedly defective product do not have a cognizable claim if the defect has not manifested itself in the product they own. *See, e.g., Yost v. General Motors Corp.*, 651 F. Supp. 656, 658 (D.N.J. 1986) ("damage is a necessary element of both counts – breach of warranty and common law fraud"); *Jarman v. United Industries Corp.*, 98 F. Supp. 2d 757, 768 (S.D. Miss. 2000) (plaintiff did not have a claim for breach of warranty because, "unless there is actually a failure in product performance, there is no basis at all for claiming that the plaintiff has been damaged in any way"); *Feinstein v. Firestone Tire and Rubber Co.*, 535 F. Supp. 595, 602 (D.C.N.Y. 1982) (under New York's version of the Uniform Commercial Code, "[t]ires which lived full, productive lives were, by demonstration and definition, 'fit for the ordinary purposes' for which they were used; hence they were 'merchantable' . . . , and no cause of action for breach of an implied warranty can arise"); *Carlson v. General Motors Corp.*, 883 F.2d 287, 297 (4th Cir. 1989) (no claim for breach of implied warranty of merchantability for plaintiffs who alleged damages attributable only to "lost resale value"); *In re Air Bag Products Liability Litigation,* 7 F. Supp. 2d 792 (E.D. La. 1998) (plaintiffs could not state a claim under either Louisiana or Texas law for economic loss from allegedly defective air bags).

As this Court stated in *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559 (1996), "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Id.* at 573, n. 19, *citing Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). That is precisely what the Oklahoma *Ysbrand* decision permits.

Respondents have argued, and Petitioner disputes, that Michigan is in the minority and will permit a "no injury" claim. If Respondents are correct in their interpretation of Michigan law, and if the Oklahoma *Ysbrand* decision is allowed to stand, DCC could be found liable to plaintiffs residing in all 50 States and the District of Columbia for conduct that would not be actionable if DCC were sued in individual actions in jurisdictions applying a different law. That would be a Due Process violation "of the most basic sort." *See BMW,* 517 U.S. at 573, n. 19. The Oklahoma Chamber requests that this Court grant DCC's Petition for a Writ of Certiorari in order to consider the Due Process rights of DCC and other manufacturers to whom the Oklahoma *Ysbrand* decision, if allowed to stand, may be applied.

PROPOSITION TWO: THE OKLAHOMA *YSBRAND* DECISION DECIDES AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT, A DECISION OF ANOTHER STATE COURT OF LAST RESORT, AND DECISIONS OF UNITED STATES COURTS OF APPEAL.

Rule 10(b) and (c) of the Rules of the Supreme Court of the United States provides, in relevant part, that considerations governing review on certiorari include the following:

> a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals; [and that] a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Those considerations apply here.

The Oklahoma *Ysbrand* decision decides an important federal question. Had the Supreme Court of Oklahoma concluded, in accordance with the decisions of many other jurisdictions, that the laws of the many states in which the individual plaintiffs purchased their vehicles applied, it would not have been able to grant class certification. By finding, however, that the law of the principal place of business of the manufacturer applies to each of the purported class plaintiffs' claims for breach of warranty, regardless of the residency of the plaintiffs or where the sales took place, the Supreme Court of Oklahoma has decided an important federal question relating to Due Process protections of manufacturers.

The Oklahoma *Ysbrand* decision decides this important federal Due Process question in a way that conflicts with relevant decisions of this Court. That decision conflicts with the decision of this Court in *Phillips Petroleum Co. v. Shutts,* 472 U.S. 797 (1985), in that the Supreme Court of Oklahoma did not "first determine whether [Michigan] law conflicts in any material way with any other law which could apply." *Id.* at 816. Neither did the Supreme Court of Oklahoma follow the rule in *Shutts* that "[Michigan] must have a significant contact or significant aggregation of contacts to the claims asserted by *each member of the class,* contacts creating state interests, in

order to ensure that the choice of [Michigan] law is not arbitrary or unfair." *Id.* at 821-22 (emphasis added). Contrary to *Shutts,* the Supreme Court of Oklahoma considered the contacts with the State of Michigan, where DCC has its headquarters, as the most significant relationship with the claims of the proposed class as a whole, instead of considering the significant contacts of each member of the proposed class.

Further, the Oklahoma *Ysbrand* decision decides this important federal Due Process question in a way that conflicts with the decision in *BMW of N. Am., Inc. v. Gore,* 517 U.S. 559 (1996). In *BMW,* this Court reversed and remanded an excessive punitive damages award against a manufacturer. This Court found that the award violated Due Process protections because, *inter alia,* the award was based at least in part on conduct that occurred in other states, the laws of which would not permit such an award. This Court stated:

> Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents. Nor may Alabama impose sanctions on BMW in order to deter conduct that is lawful in other jurisdictions.

Id. at 572-73 (footnote omitted). Here, the effect of the Oklahoma *Ysbrand* decision, if upheld, will be to apply the law of Michigan, which Respondents contend permits "no injury" claims, to claims for conduct that is not actionable in other jurisdictions and that has no impact on Michigan or its residents.

The Oklahoma *Ysbrand* decision also decides this important federal Due Process question in a way that conflicts with the decision of at least one other state court of last resort, i.e., the Supreme Court of Texas. Texas courts, like those in Oklahoma, follow the "most significant relationship" test in determining what law should apply to a plaintiff's claims for breach of warranty. *See Henry Schein, Inc. v. Stromboe,* 102 S.W. 3d 675, 696 (Tex. 2002); *Bohannan v. Allstate Ins. Co.*, 1991 OK 64, ¶ 24, 820 P.2d 787, 795 (Okla. 1991). In *Schein,* the court noted that some members of the proposed class had agreements that provided that Texas law applied. The court found, however, that "class members who have not agreed to be bound by Texas law are not necessarily required to do so merely because Schein is in Texas." 102 S.W.3d at 696. The court further stated:

> Texas . . . does not apply the law of the state where a defendant is headquartered to every claim for economic damages that can be alleged against the defendant. The trial court's contrary conclusion was erroneous. The plaintiffs do not argue that a nationwide class should be certified if the trial court must look to the laws of all fifty states to adjudicate the claims. State and federal courts have overwhelmingly rejected class certification when multiple states' laws must be applied. For this reason, the plaintiffs have failed to show that legal issues predominate.

Id. at 698-99 (footnotes omitted).

In addition, many United States courts of appeals have also held that liability for alleged defects in nationally-marketed products cannot be determined by reference to only one state's law. Applying the choice-of-law regimes of

many different jurisdictions, many courts have concluded that such cases must implicate the law of *each and every* jurisdiction in which the challenged product was sold.

In reversing an order of class certification, the court in *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002), noted that "the . . . conclusion that one state's law would apply to claims by consumers throughout the country . . . is a novelty." Further, in *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1187; *amended and superseded on other ground, re'hg denied*, 273 F.3d 1266 (9th Cir. 2001), the court stated that "the district court correctly noted that '[p]laintiff does not show how application of California law satisfies constitutional due process requirements in this case.'" The court further noted that, "[o]n appeal, Zinser concedes that under *[Shutts]*, California law cannot be constitutionally applied to all putative class members." *Id.* In *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 312-315 (5th Cir. 2000), the court rejected the notion that the law of the state "where the product was manufactured and where it was placed in the stream of commerce" should control warranty claims in nationwide product defect class action. *See also, Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674-675 (7th Cir.), *cert. denied*, 534 U.S. 951 (2001) (vacating certification of nationwide product defect class while observing that "few warranty cases ever have been certified as class actions – let alone as nationwide classes, with the additional choice-of-law problems that complicate such a venture."); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 618, (3d Cir. 1996), *aff'd, Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (reversing certification of class and finding that differences in the plaintiffs' claims "when exponentially

magnified by choice of law considerations, eclipse any common issues in this case").

By determining that liability for alleged defects in nationally-marketed products may be determined by reference to only one state's law, without considering whether the application of that law would dilute a manufacturer's Due Process protections, the Supreme Court of Oklahoma has decided an important federal question in a way that conflicts with the decisions of several United States courts of appeals.

PROPOSITION THREE: THE OKLAHOMA *YSBRAND* DECISION, IF ALLOWED TO STAND, IS LIKELY TO AFFECT THE DECISIONS OF MANUFACTURERS.

Class action litigation tends to be filed in jurisdictions that are most hospitable to such actions. *See generally* Thomas M. Woods, Note, *Wielding the Sledgehammer: Legislative Solutions for Class Action Jurisdictional Reform,* 75 N.Y.U. L. Rev. 507, 515 (May 2000). Certification under circumstances in which most other courts would not certify a class signals Oklahoma's willingness to become a favored destination for plaintiffs seeking a forum for nationwide class actions, and in particular, "no injury" class actions.

The flip side of attracting class action plaintiffs to Oklahoma courts is likely to be repelling manufacturing defendants from doing business in the State of Oklahoma – especially where manufacturers may be found liable in Oklahoma courts for conduct that is not related to Oklahoma and that would not be actionable in other jurisdictions. More than 80% of corporate attorneys interviewed

as part of a 2003 study agreed that perceptions about a state's liability system "could strongly influence whether a corporation would locate or do business in a state." *See* Oklahoma 21st Century, Inc., *State Policy and Economic Development in Oklahoma: 2004* (2004), *available at* http://www.okstatechamber.com/file_upload/OK21st2004.pdf at 70 (last visited April 30, 2004). Other studies similarly show that the perceived reasonableness of a state's legal framework is a factor that business decisionmakers consider when determining where to locate or do business. *See, e.g.,* Harris Interactive, Inc., *State Liability Systems Ranking Study,* 1, 7 (March 8, 2004), *available at* http://www.legalreformnow.com/pdfs/ILR%20Harris%20Poll.pdf (last visited May 11, 2004).

The certification of a class dramatically increases the stakes of litigation. Recent verdicts awarding astronomical damages (most of which are consumed by plaintiffs' attorney fees) have created an almost irresistible pressure to settle class action litigation, even where the claims are meritless. *See, e.g.,* Max Boot, *Federalist Society: Conference: Civil Justice and the Litigation Process: Do the Merits and the Search for Truth Matter Anymore? Day One: Panel One: Class Action Litigation: Introduction,* 41 N.Y. L. Sch. L. Rev. 337, 338 (1997), (stating that "certifying a class often puts a gun to defendants' heads and forces them to settle cases that are largely meritless"); *see also* David Minvielle, Comment, *Use of the Hearsay Objection in Class Certification Hearings to Promote Preliminary Evaluation on the Merits of the Case,* 45 Loy. L. Rev. 585, 597 (Fall 1999), (noting that "[c]ommentators almost universally agree that ' . . . class certification of mass torts forces settlements'"). Furthermore, the costs of defending against claims prior to certification or

settlement can be disastrous to businesses, especially those in their early years of development.

Allowing permissive certification of nationwide class actions, with the application of one State's law in violation of Due Process, could have a stifling effect on the decisions of manufacturers. Many businesses may avoid opening offices in Oklahoma or selling products to Oklahoma residents for fear that they will be found to be purposefully availing themselves of the privilege of doing business in Oklahoma. *See, e.g., Hanson v. Denckla*, 357 U.S. 235 (1958) (finding purposeful availment to be necessary to the constitutional exercise of jurisdiction by a state over a foreign corporation). Businesses would be justified in doing all within their power to minimize their contacts with Oklahoma to a level just below that which would give courts of Oklahoma general personal jurisdiction over them, so that they could not successfully be sued in the State of Oklahoma. *See, e.g., Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (holding that the business defendants' contacts with the state in which they were sued were not sufficient to permit the constitutional exercise of general personal jurisdiction over them); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980) (same). The Oklahoma Chamber requests that this Court consider these potential effects of Due Process violations inherent in the Oklahoma *Ysbrand* decision.

IV. CONCLUSION

For the reasons stated herein, The Oklahoma Chamber requests that this Court grant DCC's Petition for a Writ of Certiorari.

Respectfully submitted,

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